

MAF 24 1999

JAMES F. CARSEL, DEAN

QUALITY

ORIGINAL

1 **3. Defendant's Fact No. 3.**

2 **(a)** Contrary to the requirements of LR 56.1(b), Blackford does not
 3 specify in his Statement of Specific Facts in Opposition to Defendant's Motion for
 4 Summary Judgment ("Plaintiff's Statement of Specific Facts") those facts that
 5 counter Defendant's Fact No. 3. The Court thus may deem it undisputed under
 6 LR 56.1(d).

7 **(b)** The assertion in Plaintiff's Fact No. 7 that "there was no formal
 8 or written employment rule or policy at Battelle requiring that employees such as
 9 Blackford maintain a certain level of funded participation in projects on penalty of
 10 discharge," does not counter Defendant's Fact No. 3. The deposition excerpts
 11 cited in Plaintiff's Fact No. 7 -- Neal Deposition at 24 and Mahan Deposition at
 12 12-13 -- do not support it. Neal simply testified that he did not know of "a policy
 13 or regulation or rule that specifically indicated that a person who did not maintain
 14 the appropriate level of funding for projects for themselves on projects was subject
 15 to discharge," and Mahan testified that he did not know whether the policy
 16 requiring employees to maintain their funding was set forth in writing.

17 **4. Defendant's Fact No. 4.** Not disputed.

18 **5. Defendant's Fact No. 5.**

19 **(a)** Contrary to the requirement of LR 56.1(b), Blackford does not
 20 specifically identify in his Statement of Specific Facts any facts that are contrary to
 21 Defendant's Fact No. 5. Pursuant to LR 56.1(d), the Court thus may assume that
 22 the facts are admitted to exist without controversy.

23 **(b)** Defendant's Fact No. 5 is not countered by the assertion in
 24 Plaintiff's Fact No. 7 that

25 Blackford was never presented with such a rule or policy
 26 [i.e., one "requiring that employees such as Blackford
 maintain a certain level of funded participation in

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projects on penalty of discharge”] in any formal sense prior to being told by Mr. Heister, on page three of his last performance evaluation, that it was “Our cultural expectation” . . . “that senior staff, like yourself, will keep themselves fully funded on project work.”

This portion of Plaintiff’s Fact No. 7 is contrary to Exhibit B to the Heister Declaration, in which Heister informed Blackford, in June 1995, that it was an expectation that staff such as Blackford “take ownership for finding project assignments and that they take a proactive role in aligning themselves with assignments that are rewarding as assist with their career development.” It is also contrary to Paragraph 5 of the Heister Declaration and Exhibit A to the Heister Declaration, in which Heister, in December 1995, refers to Blackford’s “concerns about the way we do business in the department and the laboratory in general **as far as insisting that individuals are 100% covered with project work.**” (emphasis added.) Blackford cannot create a fact issue simply by disputing the plain language of these documents.

6. **Defendant’s Fact No. 6.** See discussion of Defendant’s Fact No. 5 above.

7. **Defendant’s Fact No. 7.** Contrary to Blackford’s assertion, Defendant’s Fact No. 7 is not countered by Plaintiff’s Facts Nos. 4, 5, and 13.

(a) Plaintiff’s Facts Nos. 4, 5, and 13 do not contest the first sentence of Defendant’s Fact No. 7, that Blackford had difficulty keeping himself fully occupied with project work, and charged much of his time to idle time.

(b) Blackford appears to take issue only with the second sentence of Defendant’s Fact No. 7, which states that Blackford was viewed as a poor contributor and as a nonproductive member of project teams, and that this contributed to his problems in finding sufficient project work. Contrary to Plaintiff’s Fact No. 4, Blackford’s December 1995 and January 1997 performance

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1 evaluations (Blackford Decl. Exs. A and B, and Heister Decl. Exs. A and C) do not
 2 counter the second sentence of Defendant's Fact No. 7. Rather, those performance
 3 evaluations identified performance problems. *See* Heister Decl. Ex. A at 2, Ex. C
 4 at 1-3. In addition to the performance problems identified on pages 1 through 3 of
 5 the January 1997 performance evaluation, Heister listed on page 3 of that
 6 performance evaluation four expectations of a S/E III (Blackford's classification)
 7 that Blackford was not fully meeting, stated that his failure to do so "has a
 8 significant impact on your not being able to keep yourself fully funded on project
 9 work," and concluded that "these are the areas of performance expectation in
 10 which you need to continue improving to rectify the situation of your not being
 11 able to maintain a project funded status." Heister Decl. Ex. C at 3. In addition,
 12 Blackford's February 1995 performance evaluation, Blackford Decl. Ex. D, which
 13 was issued *before* Blackford's February 22, 1995 memo raising his complaints,
 14 details numerous performance problems.

15 (c) The statement in Plaintiff's Fact No. 5 that Blackford "formed
 16 the understanding, on the basis of comments made to him by some of those project
 17 managers, that Mr. Heister and others in Battelle's management were sabotaging
 18 his attempts to find work on projects" is hearsay, FRE 802, and should be stricken.
 19 Although the admission of a party opponent is an exception to the hearsay rule,
 20 FRE 801(d)(2), to admit a statement under that exception, the proponent must
 21 identify the agent or agents of the adverse party who made the supposed
 22 admission. *Zaken v. Boerer*, 964 F.2d 1319, 1323-24 (2d Cir.), *cert. denied*, 506
 23 U.S. 975 (1992); *Gulbranson v. Duluth, Missabe & Iron Range Rwy. Co.*, 921 F.2d
 24 139, 142 (8th Cir. 1990); *Wells v. General Elec. Co.*, 807 F. Supp. 1202, 1209 (D.
 25 Md. 1992), *aff'd* 9 F.3d 1112 (4th Cir. 1993). Blackford has not done so, and the
 26 statement, together with the second sentence of Paragraph 5 and the second

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1 sentence of Paragraph 12 of the Declaration of James M. Blackford, should be
2 stricken.

3 (d) The assertions in Plaintiff's Fact No. 13 do not controvert the
4 fact that Blackford had poor performance on several projects and that this
5 contributed to his problems in finding sufficient project work.

6 8. **Defendant's Fact No. 8.** Not disputed.

7 9. **Defendant's Fact No. 9.** Not disputed.

8 10. **Defendant's Fact No. 10.** Not disputed.

9 11. **Defendant's Fact No. 11.** Not disputed.

10 12. **Defendant's Fact No. 12.** Not disputed.

11 13. **Defendant's Fact No. 13.** Not disputed.

12 14. **Defendant's Fact No. 14.** Contrary to Plaintiff's Fact No. 6, there are
13 no facts showing that the exchange of e-mail that is Exhibit C to the Blackford
14 Declaration had any effect on Heister's recommendation that Blackford be
15 terminated or on Work's decision to authorize the termination.

16 (a) Blackford Decl. Ex. C consists of three e-mail messages. In the
17 first message, at the bottom of the second page of Exhibit C, James Wise told Earl
18 Heister that he would need at least a month of funding to transfer Blackford onto a
19 project called SPIRE. Heister's response, at the bottom of the first page and the
20 top of the second page of Exhibit C, states that he could not fund project work
21 from training funds, because it would be an illegal charging practice, but that he
22 could fund training time. Wise's reply appears at the top of the first page of
23 Exhibit C. Wise stated that the issue was moot because he was being removed as
24 project manager of the SPIRE project. Wise then stated that another Battelle
25 employee, Richard Chidester, had said of Blackford, "we don't want him here.
26 He's a troublemaker." It is clear from the e-mail exchange that the statement by

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1 Chidester, if it occurred, did not affect Wise's opinion of Blackford. Nor is there
 2 any evidence that Heister relied on this supposed statement by Chidester when,
 3 over a year later, he recommended that Blackford's employment be terminated.
 4 There is no evidence that Gerald Work, who decided to terminate Blackford, ever
 5 saw Exhibit C.

6 **(b)** The contentions contained in Plaintiff's Fact No. 10 do not
 7 counter the substance of Defendant's Fact No. 14. Richard Neal recognized that
 8 Blackford considered himself to be a whistleblower, but that does not establish that
 9 Heister recommended that Blackford be terminated or that Work decided that
 10 Blackford be terminated as a result of his would-be whistleblower status. The
 11 deposition testimony of Richard Neal at 15-16 shows only that Neal was aware that
 12 Blackford believed that he was being harassed and subjected to reprisal (although
 13 not for opposing discrimination at Battelle), but it does not show that Blackford's
 14 perception of himself had any effect on Heister's termination recommendation or
 15 Work's decision to terminate. The deposition testimony cited in the third sentence
 16 of Plaintiff's Fact No. 10, Neal Dep. at 9, refers to what was done in 1995 when
 17 Blackford's supervisor gave him an "improvement required" performance rating.
 18 The testimony does not state that a career development plan was necessary before
 19 terminating Blackford's employment in 1997, nor does it counter the testimony
 20 that the recommendation and decision to terminate Blackford were based solely on
 21 his failure to keep himself fully occupied with project work.

22 **15. Defendant's Fact No. 15.** The evidence cited in Plaintiff's Fact
 23 No. 16 does not counter Defendant's Fact No. 15. It does not show that Heister or
 24 Work were aware of Blackford's allegations concerning financial misreporting
 25 with respect to the UniCall process at the time Blackford was terminated.
 26 Blackford's theory appears to be that Mahan, the person for whom Blackford did

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1 the work on the UniCall project, must have put some information about
 2 Blackford's concerns about the UniCall process into a file that Mahan had
 3 maintained on Blackford, and that Mahan must have provided that file to the
 4 Human Resources Department prior to Blackford's termination. But this is pure
 5 speculation, and in any event the evidence is to the contrary. Mahan was not
 6 Blackford's supervisor when he created the documentation file in November of
 7 1993, Mahan Dep. 79:25-80:4; 81:1-3 (Ex. 1 to Plaintiff's Statement of Specific
 8 Facts). Mahan was not certain whether the file contained any information from the
 9 period after Blackford worked for him. *Id.* at 81:10-21. In deposition testimony
 10 that Blackford did not supply the Court, Mahan testified that his documentation file
 11 had been inactive "for a long time," and that it had been inactive as of
 12 November 1993. Mahan Dep. 104:1-18 (attached hereto as Ex. 1). Moreover,
 13 Mahan had no input into the decision to discharge Blackford; he was not even
 14 asked his opinion. *Id.* at 76:14-19 (attached hereto as Ex. 1). There is no evidence
 15 that Mahan gave his file to the Human Resources Department before Blackford
 16 was terminated. Finally, Neal's participation in the discharge of Blackford was as
 17 part of the Personnel Action Review Committee that reviewed Work's decision to
 18 discharge Blackford. Neal Dep. 47:6-14.

19 16. **Defendant's Fact No. 16.** Plaintiff's Fact No. 20 does not counter
 20 Defendant's Fact No. 16. In Interrogatory No. 3, Battelle asked Blackford to give
 21 details concerning "any alleged instance of wrongdoing or misconduct by Battelle
 22 other than those described in the memoranda identified in Interrogatories No. 1 and
 23 2." Blackford responded "I know of no instance of wrongdoing or misconduct not
 24 previously reported in my memorandums, which have been produced or are in my
 25 Complaint, except for the Personal Workstations Assessment Program." That
 26 Blackford referred in other interrogatory answers to various federal and state

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1 statutes that he contends are relevant to his complaints does not change the fact
 2 that the factual basis for his allegations of misconduct are, with one minor
 3 exception, contained in the two memoranda.

4 17. **Defendant's Fact No. 17.** Plaintiff's Facts Nos. 17, 18, 19 and 21 are
 5 not contrary to Defendant's Fact No. 17.

6 (a) First, Blackford seems to rely on a news group posting that a
 7 Battelle employee, Darren Curtis, posted in September 1997, several months after
 8 Blackford was terminated. Blackford Decl., Ex. H. In that posting, Curtis
 9 remarked that it now "only takes two years of record keeping" to fire persons who
 10 do not do their work at PNNL, and estimated the cost of firing an S/E III to be
 11 about \$500,000. Blackford adds to this posting the facts that he was terminated
 12 two years after he was transferred to Mr. Heister and was an S/E III to conclude
 13 that Heister had plotted from the beginning to terminate him. This is pure
 14 speculation. Curtis has never been a member of line management at Battelle, and
 15 had no role in the decision to terminate Blackford. Curtis Dep. at 90:15-23
 16 (attached hereto as Ex. 2). In addition, Curtis's statements in the posting are
 17 hearsay and are not binding on Battelle as an admission of a party opponent
 18 because Blackford has not shown that Curtis was authorized by Battelle to make
 19 the statement or that his statements were made within the scope of his
 20 employment. *See* FRE 801(d)(2)(C) and (D). There is no factual basis for the
 21 assertion in Plaintiff's Fact No. 17 that Curtis was a "close personal friend" of
 22 Heister, and it should be stricken, together with the corresponding statement in
 23 Paragraph 14 of the Blackford Declaration.

24 (b) Contrary to Plaintiff's Fact No. 21, Defendant's Fact No. 17 is
 25 not a conclusion of law. In its Fact No. 17, Battelle points out, as it is entitled to
 26 do under *Celotex v. Catrett*, 477 U.S. 317, 325 (1986), that there are no facts to

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1 support Blackford's claim that he reported misconduct by Battelle that constituted
 2 a violation of the letter or policy of the law. The burden now is on Blackford to
 3 come forward with evidence showing that he did report a violation by Battelle of
 4 the law, and he has not done so.

5 18. **Defendant's Fact No. 18.** See paragraph 17(b) above.

6 19. **Defendant's Fact No. 19.** See paragraphs 17(a) and (b) above.

7 20. **Defendant's Fact No. 20.** See paragraph 17(b) above.

8 21. **Defendant's Fact No. 21.** See paragraph 17(b) above.

9 22. **Defendant's Fact No. 22.** See paragraphs 17(a) and (b) above.

10 23. **Defendant's Fact No. 23.** See paragraphs 17(a) and (b) above.

11 24. **Defendant's Fact No. 24.** See paragraphs 17(a) and (b) above.

12 25. **Defendant's Fact No. 25.** See paragraphs 17(a) and (b) above.

13 26. **Defendant's Fact No. 26.** See paragraph 17(b) above.

14 27. **Defendant's Fact No. 27.** See paragraphs 17(a) and (b) above.

15 **Rebuttal of Plaintiff's Facts**

16 In addition to the above rebuttal of those of Plaintiff's Facts that respond to
 17 Defendant's Facts, Battelle makes the following rebuttal:

18 1. **Plaintiff's Fact No. 11.** Contrary to the allegation of the first
 19 sentence of Plaintiff's Fact No. 11, the documents show that Blackford was placed
 20 on a Corrective Action Plan *before* he made the complaints contained in his
 21 February 22, 1995 memo (Blackford Decl. Ex. F). Blackford's February 1995
 22 performance evaluation, which is dated February 16, 1995, states "[e]ffective
 23 immediately, you are being placed on a monitored performance corrective action
 24 plan." Blackford Decl. Ex. D at 3. Indeed, Blackford's February 22, 1995 memo
 25 states in its first sentence that it is written *in response* to the February 1995
 26 performance evaluation. Blackford Decl. Ex. F at 1.

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2. **Plaintiff's Fact No. 14.** The statement in Plaintiff's Fact No. 14 that Blackford "was informed by some project managers that supervisors were advocating his exclusion from projects" is hearsay, FRE 802, and should be stricken. Although the admission of a party opponent is an exception to the hearsay rule, FRE 801(d)(2), to admit a statement under that exception, the proponent must identify the agent or agents of the adverse party who made the supposed admission. *See* cases cited in connection with Defendant's Fact No. 7 above. Blackford has not done so, and the statement, together with the second sentence of Paragraph 12 of the Blackford Declaration, should be stricken.

DATED this 25th day of March, 1999.

Davis Wright Tremaine LLP
Attorneys for Battelle Memorial
Institute

By Walt Whitman

Stuart R. Dunwoody
WSBA #13948
Jin H. Kim
WSBA #21958

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES M. BLACKFORD,

Plaintiff,

vs.

BATTELLE MEMORIAL INSTITUTE,

Defendant.

NO. 2:98-CS-00032

COPY

DEPOSITION UPON ORAL EXAMINATION OF
ROBERT MAHAN

TAKEN ON: Thursday, September 3, 1998

TAKEN AT: Davis Wright Tremaine
601 Williams Boulevard, Suite 3-A
Richland, Washington 99352

REPORTED BY: MARILYNN S. McMARTIN, RMR, CCR
CCR NO. MC-MA-RM-S407CC

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AFFILIATED COURT REPORTERS
509-966-6787

EXHIBIT 1

[MAHAN]

1 or who it came from. It may have been Mike gave it to
2 me. He was in the habit of keeping me informed of how
3 things were going.

4 Q. Because he considered you somebody he could confide in;
5 is that what you are saying?

6 A. I believe he considered me trustworthy with confidences
7 that he had. I believe he considered me, that I was on
8 his side in terms of I would like to see him succeed.

9 Q. Was that true, by the way?

10 A. Yes. I don't believe anybody's unsalvageable.

11 Q. So while we're on that subject, you weren't someone who
12 wanted to see him discharged?

13 A. Nope.

14 Q. Did you ultimately have input into the decision to
15 discharge him?

16 A. Nope.

17 Q. Did anybody even ask you whether you thought that it
18 should or should not occur?

19 A. No.

20 Q. Okay. Would you have characterized yourself as a
21 project manager at the time of Mr. Blackford's
22 discharge?

23 A. Yes.

24 Q. You mentioned a moment ago the file, and that's the same
25 file that I talked about at the beginning of the

[MAHAN]

1 Q. Well, maybe I'm asking a question I've already asked. I
2 apologize. But do you have any recollection of what
3 time frame you received this document in, the
4 February 22, '95 letter?

5 A. I sure don't.

6 Q. Can you even say whether you received it during
7 Mr. Blackford's employment at PNL?

8 A. No, I couldn't honestly say that for sure, although as
9 far as I know, the best of my recollection, that file's
10 been inactive for a very long time.

11 Q. Did it become inactive before Mr. Blackford was fired?

12 A. Yes. It really became inactive at the time that I wrote
13 the documentation for it. What I did from that point
14 forward is if Mike sent me E-mail, I may have put it in
15 there; I may have not. I just didn't feel any strong
16 feelings to carry it forward past then.

17 Q. Past November of '93?

18 A. That's correct.

19 Q. Were you aware of a complaint by Mr. Blackford
20 complaining about the requirement that staff fund their
21 own job assignments, in other words, find their own
22 funding -- strike that. Bad question.

23 Were you aware of a complaint that
24 Mr. Blackford made concerning the requirement that staff
25 find their own job assignments and arrange their own

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES M. BLACKFORD,

Plaintiff,

vs.

BATTELLE MEMORIAL INSTITUTE,

Defendant.

Case No.

98-CS-00032

COPY

DEPOSITION OF DARREN CURTIS

Taken at the instance of the Plaintiff

February 12, 1999

9:00 a.m.

601 Williams Boulevard

Richland, Washington

BRIDGES & ASSOCIATES
Certified Shorthand Reporters
P. O. Box 5999
Kennewick, Washington 99336
(509) 735-2400 - (800) 358-2345

EXHIBIT 2

1 E-mail to think that the purpose of that \$500,000
2 was to fire someone?

3 A. I take this as this is Dwight's
4 sarcastic and flippant post to my post. That's how
5 I took it.

6 MR. LACY: That's all of my
7 questions for you today. Thank you.

8 MR. DUNWOODY: All right. I've got
9 a few questions for you.

10
11
12 EXAMINATION

13
14 BY MR. DUNWOODY:

15 Q. Mr. Curtis, during the time you've been
16 at Battelle, have you ever been a member of
17 management?

18 A. I am a project manager now. Whether
19 that's a part of -- I have not been a direct member
20 of line management, overseeing staff development.

21 Q. Did you have any role in the decision
22 to terminate the employment of Michael Blackford?

23 A. No.

24 Q. Now I would like you to take a look at
25 Exhibit 1, page 5, the second box from the top.

DARREN CURTIS - by Mr. Dunwoody 90